FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
APR 23 1906
JAMES H. McKENNEY,
Clerk.

No. 230.

ANTONIO ORTEGA, PLAINTIFF IN ERROR,

vs.

ANGELA LARA.

SUPPLEMENTAL MEMORANDUM FILED BY DEFENDANT IN ERROR.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
T. D. MOTT, JR.,
For Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 21294

PREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 230.

ANTONIO ORTEGA, PLAINTIFF IN ERROR,

vs.

ANGELA LARA.

UPPLEMENTAL MEMORANDUM FILED BY DEFENDANT IN ERROR.

'o defeat the action the plaintiff in error relies upon the visions of articles 43 and 44 of the Civil Code in force in to Rico between 1889 and 1902, which articles are as fol-s:

Art. 43. Future espousals (esponsales de futuro) do not rise to an obligation to contract marriage. No tribunal ll admit a complaint in which their fulfillment is de-nded.

Art. 44. If the promise (la promesa) has been made in a lic or private instrument by a person of age, or by a minor he presence of the person whose consent is necessary for celebration of the marriage, or when the banns have been lished, the person who refuses to marry, without just se, shall be obliged to indemnify the other party for the enses (los gastos) which he or she may have incurred by on of the promised marriage.

"An action to recover indemnity for the expenses to which the foregoing article refers may be instituted only within a year counted from the day of the refusal to celebrate the marriage."

But the fact that by article *43* it is provided that no tribunal shall admit or maintain jurisdiction of a complaint to compel the fulfillment of a contract of marriage—that is, an action in the nature of a bill for specific performance—and notwithstanding the fact that article *44* in the event of a breach gives a special right of action to recover expenses (los gastos), it does not at all follow that the aggrieved party cannot, in addition to the action for expenses, or apart from it, maintain an action against the recalcitrant promisor to recover damages (daños y perjuicios).

In this connection reference is made to Escriche Diccionario Razonado de Legislacion y Jurisprudencia, 1876, where, under the title "Esponsales,' the following occurs:

"ESPONSALES—the promise of marriage mutually made between a man and a woman with reciprocal acceptances (Law I, title I, part IV). They are called 'esponsales' (espousals), from the Latin word *spondeo*, which means to promise."

I.

Formerly there were two different kinds of "esponsales," to wit, "esponsales de presente" and "esponsales de futuro." * * * There now remains solely the "esponsales de futuro" (future espousals), which are those which are defined and treated of in this article. * * *

IV.

The "esponsales" produce two effects, namely: The first one is the mutual obligation to marry; but this obligation is not absolute and efficacious, since, if one of the two "esposos" (promisors) refuses to fulfill the said obligation, the ecclesiastical judge has no power to enforce the same except indirectly by refusing to grant him or her a license to marry some other person. "*Sponsus qui fidem datam sine justa causa recusat ademplire, monendus est potius quam cogendus,*" said the Pope Lucius the III, "*siquidem coacta matrimonia tristes infelices exitus habere solent.*" But although the "esposo" (promisor) who refuses to fulfill his promise cannot be compelled to so do, he can nevertheless be condemned by the secular judge to indemnify the "esposa" from the damages (perjuicios) suffered by her on account thereof. The second effect consists in a kind of affinity supposed to be of "public honesty" springing by virtue of the "esponsales" between the "desposados" (betrothed) and the relatives of the other one, so that neither the relatives of the "esposo" (man) can marry the "esposa" (woman) nor the relatives of the "esposa" can marry the "esposo." This impediment was formerly a bar even if the "esponsales" were void, but the "Concilio de Trento" entirely abolished the same in the cases where could be some nullity affecting the "esponsales" and limited the said impediment to the first degree when the "esponsales" were validly contracted (*Sess. 24, De Reform mtr., chap. 3*).

VI.

Cognizance of the cases regarding the effectiveness of the "esponsales" or their rescissions, as well as regarding the obligation which binds the contracting parties, corresponds to the ecclesiastical jurisdiction (Law VII, title I, part IV), while the cases concerning the damages and prejudices (daños y perjuicios) which the "desposado" (promisor) who, without just cause, refuses to fulfill his promise ought to pay to the other belong to the secular tribunals only, because they are merely temporal and worldly matters, just as in cases of divorce the ecclesiastical judges are forbidden from interfering in cases relating to the restitution of the dowry, matrimonial properties, judicial fees, and alimony (Law XX, title I, liber II, Nov. Rec. See *Divorce*).

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
T. D. MOTT, JR.,
For Defendant in Error.